

Service Date: September 16, 1985

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of HARVEY JAMES WEGNER, Hardin,)	
Montana, for a Class C Certificate)	DOCKET NO. T-8684
of Public Convenience and)	
Necessity.)	ORDER NO. 5622

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

James E. Torske, Esq., 314 North Custer Avenue, P.O. Drawer F,
Hardin, Montana 59034, appearing on behalf of the Applicant

FOR THE PROTESTANT:

John H. Grant, Attorney at Law, Jackson, Murdo and Grant, 203
North Ewing St., Helena, Montana 59601, appearing on behalf of
Big Horn Transportation Co., P.O. Box 22007, Billings, Montana
59104

FOR THE COMMISSION:

Timothy R. Baker, Staff Attorney, 2701 Prospect Avenue,
Helena, Montana 59620

BEFORE:

TOM MONAHAN, Commissioner and Hearing Examiner

BACKGROUND

1. On February 22, 1985, the Commission received an application from Harvey James Wegner, Route 1, Hardin, Montana 59034.

Applicant then sought a Certificate of Public Convenience and Necessity to transport stoker coal to public and private institutions, Class C, between all points and places in Big Horn, Treasure, Rosebud, and Yellowstone Counties.

2. After publication, the Commission received two protests from authorized carriers, namely Big Horn Transportation Company and Transystems, Inc. The Commission issued a notice of a public hearing on this matter to be held on Thursday, May 23, 1985, in room 103, Big Horn County Courthouse, Hardin, Montana, at 9 a.m.

On May 22, 1985, the Applicant moved for a continuance of the scheduled hearing to a later date convenient to the Commission.

3. On or about May 21, 1985, the Commission was advised by counsel for Transystems, Inc. that the Applicant was going to restrictively amend its application at hearing. Upon such amendment, the protest of Transystems, Inc. would be withdrawn.

4. Following issuance of a second notice, the Commission conducted a public hearing to consider the application on July 30, 1985, at 1:30 p.m. in the Big Horn County Courthouse, Hardin, Montana.

5. Upon conclusion of the hearing on July 30, 1985, the parties stipulated to submitting this matter to the Commission for a final decision, thus eliminating the need for a proposed order, pursuant to ARM Section 38.2.4802(2).

SUMMARY OF TESTIMONY

Testimony of Applicant

6. Harvey James Wegner appeared and testified in support of the application. He is a 35 year resident of Hardin, and a sole

proprietor who has been hauling gravel for several years. He tendered the following exhibit:

Exhibit No. 1 - A stipulation amending his application to one requesting a Certificate of Public Convenience and Necessity to transport stoker coal to public and private institutions, Class C, between all points and places in Big Horn County (deleting Treasure, Rosebud, and Yellowstone counties from his original application). There was no objection to this exhibit by the Protestant.

7. Mr. Wegner testified that he had been hauling stoker coal to the schools in Hardin during the previous winter under a contract with the Hardin Public School District Nos. 1 and 17-H. This contract expires in January, 1986, and as of this date, no new contract has been awarded. Mr. Wegner stated that the existing contract was awarded after an advertisement for bids by the Hardin School District.

8. Mr. Wegner did not have any PSC authority during this period. He was not aware of the fact that such authority was required. He was apparently stopped by a state GVW employee who informed him that he needed PSC authority to operate. Mr. Wegner then obtained the necessary authority by entering into a lease arrangement with an authorized carrier, which has since been examined with approval by a local scale operator.

9. Mr. Wegner also testified that the school facilities hold approximately 35 tons of coal. During the previous winter, he met the needs of the school on an "as needed" basis and it was his

responsibility to keep track of the coal levels at the school facilities. He has been told that if he receives the authority he is now seeking, the school district will probably renew his contract. He has also been approached by Holmes Plumbing, of Hardin, who distributes coal locally. They have indicated that they will need approximately 25 tons of coal a week. Mr. Wegner testified that he has been led to believe that other private enterprises in Big Horn County will also hire him on a contract basis to transport stoker coal.

10. Mr. Wegner stated that he only intended to provide a service that is not now being provided in Big Horn County. He stated that he was able to serve the needs of both the Hardin School District and other private enterprises around Big Horn County, since he was located in Hardin and could be flexible with his time. Mr. Wegner testified that he presently carries liability insurance in excess of three million dollars. The application submitted to the Commission reveals that the Applicant owns his own equipment, including a 1976 Peterbuilt and a grain trailer with a capacity of 25 tons, and appears to be stable financially.

Testimony of Shipper Witnesses

11. Joseph Vincent Keobbe appeared and testified in support of the application. Mr. Koebbe is the chairman of the Hardin

School Board, and has been a member of that organization for 12 years. He also operates a retail business in Hardin.

12. Mr. Koebbe testified that this would be the fourth year that the school system used stoker coal as its primary source of heat. During the first two years, the coal supplier also delivered the stoker coal to the school facilities. In the following year, after advertisement, separate bids were taken for supply and delivery. After bids were reviewed, the delivery contract was awarded to the Applicant. That contract will be in effect until January, 1986. It is necessary for the school district to award and enter into a formal contract.

13. Mr. Koebbe stated that the school district was fully satisfied with the Applicant's performance under the contract last year, and would probably renew said contract for the upcoming year should the Applicant receive the proper authority from the Commission. Since the Applicant lives in Hardin, he was able to monitor the school's stoker coal supply, and deliver on an "as needed" basis without any further action on the part of the school district. This is a desirable arrangement for the school district.

The coal was delivered from a mine belonging to the Schultz Coal Co., located on the southern boundary of Montana.

14. Mr. Koebbe further testified that he had no preferences as to which carrier delivered the stoker coal to the school facilities, as long as the cost to the school district remained at

a minimum. Mr. Koebbe had no complaints about the Protestant Big Horn, but also qualified this by stating that he had never heard of the Protestant Big Horn. Mr. Koebbe also testified that he has very recently been contacted by agents of the Protestant Big Horn, who expressed a desire to be notified of the next advertisement for bids for the stoker coal delivery contract.

15. William Wagner of Hardin, appeared and testified in support of the application. He is the proprietor of Holmes Plumbing and Heating, also in Hardin. For the last five years, he has also been a local distributor of stoker coal. In the past, Mr. Wagner has hauled his own coal to his facilities, but he recently sold his truck, and now needs to contract with a carrier for delivery. He would need between 300 and 500 tons of stoker coal per year for his distributing operation, to be delivered on an "as needed" basis.

16. Mr. Wagner stated that he would probably contract with the Applicant for the delivery of stoker coal should the proper authority be granted by the Commission. He has been purchasing his stoker coal from Bighorn Coal, in Wyoming, but indicated that he may switch to the Schultz Coal Co. this year, since it was his understanding that their prices were cheaper.

17. Mr. Wagner has no complaints or objections about the Protestant Big Horn, but also stated that until lately, he has never heard of them. He stated that he has very recently been

contacted by agents of the Protestant Big Horn, who expressed a desire in serving his carrier needs. Mr. Wagner further stated that he would not want to pay for the Protestant Big Horn to deadhead from Billings to the mine before delivery.

Motion to Dismiss

18. At the close of the Applicant's case, the attorney for Protestant Big Horn moved to dismiss the application on the grounds that no showing of public convenience and necessity has been made.

According to Protestant's counsel, the testimony of Mr. Wagner should not be considered, since he was buying his coal in Wyoming.

The other shipper witness, Mr. Koebbe of the Hardin School Board, did not express any dissatisfaction with the Protestant's services.

19. The Applicant's counsel countered that Mr. Wagner's testimony is relevant, as he is considering the purchase of coal from the Schultz Mine in Montana for the coming year, and will probably do so if the Applicant is granted the requested authority by the Commission. Further, until this application, none of the shipper witnesses had even heard of the Protestant Big Horn. The Protestant Big Horn, until this application, has not sought any business in the Hardin area, and has not made itself available. The Hardin School District has sought bids for its coal delivery, and the Protestant Big Horn did not submit a bid. Since no other

carriers are protesting the application, a showing of public convenience and necessity has been made.

20. The Motion to Dismiss was taken under advisement.

Testimony of Protestant Big Horn

21. George Graham, marketing agent for Protestant Big Horn Transportation, appeared and testified against the application. He described the Protestant Big Horn's operations, and tendered the following exhibits:

Exhibit A: PSC No. 7267, authorizing the Protestant Big Horn Transportation Company to operate as a Class B carrier intrastate between all points and places in the State of Montana. There was no objection to this exhibit by the Applicant.

Exhibit B: The July, 1985, equipment list for the Protestant Big Horn Transportation Company. There was no objection to this exhibit by the Applicant.

Exhibit C: Letter dated April 29, 1985, to Mr. Rodney Svee, Superintendent of Hardin Public School District Nos. 1 and 174, from George A. Graham of Big Horn Transportation Co., soliciting future business. The counsel for Applicant objected to this exhibit under the Best Evidence Rule. The exhibit was admitted over this objection.

22. Mr. Graham testified that the Protestant Big Horn's main office is located in Billings, Montana. The Protestant Company has

had considerable experience in hauling coal in the past, and is capable of hauling it during the winter months with no problem. The Protestant has hauled coal, feed, and fertilizer into the immediate Hardin area on previous occasions. The Protestant would employ grain trailers to transport stoker coal. There are no contamination problems with using the same facilities for grain and stoker coal. The Protestant Big Horn has several combination units capable of payloads up to 40 tons. These units are currently not used at full capacity.

23. Mr. Graham further stated that if necessary, the Protestant Big Horn would hire someone to monitor the stoker coal needs of the school. The Protestant could certainly meet the transportation needs of the school district, as well as those of Holmes Plumbing. Service could be provided on a call basis, and the response time of the Protestant Big Horn to Hardin is approximately 1-2 hours. The Protestant Big Horn would not charge for deadhead hauls, but only from pickup to delivery.

24. Mr. Graham further testified that he was not aware of the terms of the contract between the Applicant and Hardin School District Nos. 1 and 17. Mr. Graham stated that at this point in time, he could not speculate as to whether or not the Protestant Big Horn would be interested in either performing the current contract, or meeting its terms in a subsequent contract. Mr. Graham also stated that the Protestant Big Horn first became aware

of the advertisement for bids by the school district when this action was initiated by the Applicant.

25. Mr. Graham admitted that in April or so of this year, he contacted the Applicant and offered to lease authority to the Applicant so that he could continue to operate. Under this arrangement, the Applicant would continue to operate his own equipment. Mr. Graham stated that the Protestant Big Horn has no objection to the Applicant continuing to service his customers under a lease of Big Horn authority.

The Applicant refused to enter into a lease arrangement with the Protestant Big Horn.

DISCUSSION, ANALYSIS AND FINDINGS

26. There are two preliminary matters which must first be addressed by this Commission. First, primarily because of the procedural requirements mandated by Montana law, it has always been the policy of this Commission not to grant authority beyond that requested by the applicant. Here the Applicant has sought Class C authority to serve both "public and private institutions." An "institution" is defined as "an establishment, especially one of eleemosynary or public character or one affecting a community. An established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes, or

educational." BLACK'S LAW DICTIONARY 719 (Rev. 5th ed. 1979).

Thus, the Applicant, by his own action, has limited the authority that could be granted by the Commission. Holmes Plumbing and Heating, a shipper witness for the Applicant, is not an "institution," within the meaning of that term as recognized by this Commission. Accordingly, the testimony of William Wagner will not be considered in this analysis.

27. Second, the Commission must consider the effect of the Applicant's prior unauthorized operations upon this application.

The Applicant admitted that he has operated under the contract with the Hardin School District for several months without the required Commission authority. The Applicant stated that he was unaware of the requirements set by law. Nevertheless, this activity is unlawful. Section 69-12-401, MCA. In the past it has been the position of the Commission that such unauthorized operations are not, as a matter of law, a total bar to an application for authority, provided that they were either conducted under a color of right, or in good faith. See In the Matter of John D. Walker, Docket No. T-5883, Order No. 4217. See also D.F. Bast, Inc. v. Pennsylvania Public Utility Commission, 154 A.2d 505, 31 PUR 3d 473 (PA. 1959). However, it should be noted that the illegal operations will be given weight toward other factors to be examined by the Commission, such as fitness.

28. The Commission must consider several elements in judging an application for a Certificate of Public Convenience and Necessity. The threshold determination to be made is that of the Applicant's fitness, i.e., whether or not it is a suitable carrier to operate in Montana. In examining this element, the Commission chooses to view all aspects of a carrier's fitness together; these include financial fitness, intent to serve, experience and availability of equipment, as well as the nature and extent of any past illegal operations. The Applicant transported stoker coal for only a few months before realizing that his actions were unlawful.

Upon discovering his need for transportation authority, he took immediate steps to obtain the same. The Commission does not favor illegal operations, in good faith or otherwise. However, in light of the limited nature and duration of this impropriety, little weight will be given to it. The Applicant has been hauling gravel for several years, and at least part of his operation under the contract with the Hardin school system was pursuant to leased authority. The Applicant maintains liability insurance in excess of three million dollars. It is the Applicant's intention to provide a local service that is not presently being proposed. The Applicant owns his own equipment, including a 1976 Peterbuilt and a grain trailer with a capacity of 25 tons, and is financially stable. Accordingly, the Commission finds the Applicant to be fit

to undertake the operations proposed in his application, as amended.

29. The next general determination is whether or not public convenience and necessity require that we grant the requested authority. Section 69-12-323(2), MCA, provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

The concept has perhaps best been described in the landmark case of Pan-American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. at 203.

30. The first consideration in determining public convenience and necessity, then, is consideration of shipper needs (ie, whether there is a public demand or need). In this case, two shipper witnesses supported the application.

31. Mr. Koebbe testified that the primary source of heat for the Hardin Schools was stoker coal. The school system contracts separately for supply and delivery of stoker coal, and last year an advertisement for bids was published by the school system for stoker coal delivery. In addition, it is convenient for the school district if the carrier assumes responsibility for maintaining the level of stoker coal at the school facilities. The contract for delivery of stoker coal to the school system will expire this January, and a new contract for delivery will have to be sought by the school system.

The advertisement for bids by the Hardin School system provides competent evidence of a public demand and need for the transportation and delivery of stoker coal. This in itself is entitled to significant weight. It is apparent that a public demand and need, however slight, does exist. Further, there is an indication that both the public demand and need require a carrier with a consistent presence in Hardin and surrounding areas. This is another factor to be weighed upon review of all of the evidence

presented to the Commission. Although the showing made by the Applicant is not overwhelming by any means, a public demand and need for the transportation and delivery of stoker coal within Big Horn County has been demonstrated.

32. Since the Commission has determined that a public demand and need for the transportation and delivery of stoker coal exists in Big Horn County, it is now appropriate to consider whether or not that public demand or need is satisfied by the existing line of carriers.

At this point in time, it is important to reflect upon the relevant language of Pan-American Bus Lines, supra. The standard set forth therein explicitly states that the focus is on "whether |the public purpose⁵ can and will be served as well by existing lines of carriers;" Id. at 203. The Protestant Big Horn has presented to this Commission, in Exhibit B, an extensive list of equipment. Mr. Graham, stated that the Protestant Big Horn was active in Hardin and surrounding areas, but could provide no details beyond the general nature of the commodities transported.

As previously mentioned, Mr. Graham stated that the Protestant Big Horn was active in Hardin and surrounding areas. Nevertheless, until after this application was made, the shipper witness had never heard of the Protestant Big Horn. The subsequent

contacts by agents of the Protestant Big Horn with the shipper witness, including Exhibit C, are entitled to little weight, as they appear to be totally self-serving, and made in anticipation of hearing. More importantly, the Hardin School system advertised for bids for stoker coal delivery, and the Protestant Big Horn did not respond. Mr. Graham stated that the Protestant Big Horn did not become aware of the advertisement for bids until this application was filed with the Commission. Further, Mr. Graham admitted that he had no knowledge of the terms and conditions of the delivery contract between the school system and the Applicant and thus could not speculate as to whether or not the Protestant Big Horn would be even interested in pursuing such an arrangement with the school system.

On the other hand, the Applicant responded to the school's advertisement for bids, and was awarded the delivery contract. For a period of time, the Applicant served the Hardin School District under the terms of that contract with a leased authority. Mr. Koebbe testified that the school board was very satisfied with the Applicant's service, and would probably renew his contract if the requested authority is granted. Further, the Applicant is a resident of Hardin, and would base his proposed operations from that location.

On the basis of the above testimony presented at hearing, it is apparent that the public demand and need for transportation and

delivery of stoker coal within Big Horn County is not adequately served by the Protestant Big Horn alone. Even if the presence of the Protestant's operations within Big Horn County is acknowledged, that presence at best is described as minimal. Clearly, the addition of the Applicant's operations as proposed under this application is required to ensure that the demonstrated public demand and need is satisfied.

33. Having made the two preceding findings, the Commission must consider the impact upon operations of existing carriers of granting the Applicant the requested authority, and whether this impact is contrary to the public interest. The burden for establishing such an impact is on the Protestant. The agent for the Protestant Big Horn, Mr. Graham, testified that the company has equipment capable of meeting the needs of the shipper witnesses, and that this equipment was idle. However, later in his testimony, Mr. Graham stated that he has contacted the Applicant to arrange for a lease of Big Horn authority so that the Applicant could continue his operations. Under this arrangement, Mr. Graham stated that the Applicant would continue to use his own equipment. Finally, Mr. Graham testified that the Protestant Big Horn had no objections to the Applicant continuing his operations under a lease of Big Horn authority. Conceivably, the award of the requested authority to the Applicant would affect the financial operations of the Protestant Big Horn. Potential customers, or a potential lease

operation, would be lost. However, no evidence was presented on this point. Regardless, for any such financial impact to be significant, it must be shown to be contrary to the public interest. Under this analysis, it is clear that existing carriers, by virtue of their authority, are thus protected against unfair or destructive competition, but not from the effects of competition itself. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc. 419 U.S. 281 (1974). In light of this standard, the Commission finds no evidence of any impact upon the operations of the Protestant Big Horn as a result of granting the requested authority to the Applicant, which would be contrary to the public interest.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. The Application does propose an operation that will serve a useful public purpose responsive to a public demand.

4. The foregoing public demand is not satisfactorily met by existing carriers and authorities.

5. The authority granted in this order will not endanger or impair the operation of existing carriers contrary to the public interest.

6. After hearing upon the application and after giving reasonable consideration to the effect of the proposed operation upon other transportation agencies, the Commission concludes from the evidence that public convenience and necessity require the authorization of the proposed service as described below. Section 69-12-323(2), MCA. Accordingly, the Protestant's Motion to Dismiss is Denied.

ORDER

NOW THEREFORE, IT IS ORDERED that the Application in Docket No. T-8684, as amended, be GRANTED. Applicant is granted the following authority:

Class C - stoker coal, to public and private institutions between all points and places in Big Horn County.

IT IS FURTHER ORDERED that the Applicant must, within thirty (30) days of the mailing of the notice of the rights herein granted comply with all rules and regulations of the Montana Public Service Commission.

Done in Open Session this 16th day of September, 1985, by a vote of 5- 0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.